



**LEGAL ENVIRONMENTAL AID FOUNDATION OF INDIANA, INC.**

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October 5, 2010

**Via Certified Mail, Return Receipt Requested**

Lisa Jackson, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

DDalt Corporation  
Registered Agent: Deborah B. Hyndman  
720 W. US 20  
Michigan City, IN 46360

Susan Hedman, Regional Administrator  
U.S. Environmental Protection Agency  
Region V  
77 West Jackson Boulevard  
Chicago, IL 60604

Brown, Inc.  
Registered Agent: Deborah B. Hyndman  
720 W. US 20  
Michigan City, IN 46360

Northern Indiana Public Service Company  
Registered Agent: Gary Pottorff  
801 East 86th Avenue  
Merrillville, IN 46410

Bulk Transport Corp.  
Registered Agent: Deborah B. Hyndman  
720 W. US 20  
Michigan City, IN 46360

**RE: Notice of Intent to Sue Pursuant to 42 U.S.C. 9659(a)(1) for Violation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA)**

Dear Administrator Jackson, Regional Administrator Hedman and Respondents:

You are hereby placed on notice as required by CERCLA § 310, 42 U.S.C. § 9659(d)(1), 40 CFR Part 374, that People in Need of Environmental Safety ("PINES") intend to file a citizen suit against the U.S. Environmental Protection Agency ("EPA"), Northern Indiana Public Service Company, Brown, Inc., Ddalt Corp., and Bulk Transport Corp. following sixty (60) days of this letter to address EPA's and Respondents' respective violations of CERCLA.

We are legal counsel for the PINES. Any response or correspondence related to this matter should be directed to the Legal Environmental Aid Foundation of Indiana, Inc. ("LEAF") at the address above.

## I. Background & Parties

In April of 2004, the EPA and Northern Indiana Public Service Company, Brown, Inc., DDalt Corp., and Bulk Transport Corp. ("Respondents") entered into Administrative Order on Consent for a Remedial Investigation and Feasibility Study ("RI/FS"), Docket No. V-W 04-C-784 ("AOC II") in connection with the contaminated ground water plume site in and near the Town of Pines, in Porter County, Indiana ("the Site"). AOC II includes a Statement of Work ("SOW") which sets forth additional requirements for conducting a RI/FS at the Site. One such requirement is the provision of independent technical assistance to the impacted community to facilitate the community's informed participation in the decision-making process throughout the RI/FS and EPA's issuance of the ROD.

To that end, EPA and Respondents identified and selected the PINES, a non-profit, charitable organization formed by residents of the Town of Pines, as the "eligible community group,"<sup>1</sup> to receive funding under a Technical Assistance Plan ("TAP"). As will be discussed fully below, the TAP, drafted by Respondents and approved by EPA, violates applicable requirements of the AOC II, SOW and regulations which have become effective pursuant to CERCLA. Due to these violations, PINES has not able to fully participate in the RI/FS decision-making process as contemplated by CERCLA. Moreover, if these violations continue, PINES will not be able to participate in decisions made through EPA's issuance of the ROD.

Accordingly, PINES intends to bring a citizen suit against EPA and Respondents to address past and continuing CERCLA violations as follows:

## II. TAP Requirements

All activities required by the AOC II are to be conducted "in accordance with CERCLA, the National Contingency Plan (NCP), 40 C.F.R. Part 300 and all applicable U.S. EPA guidance, policies, and procedures."<sup>2</sup>

Section VII, ¶28 of AOC II states in relevant part:

*Respondents shall submit to U.S. EPA a Technical Assistance Plan for providing and administering \$50,000 of Respondents' funds to be used by a qualified community group to hire independent technical advisors to help **interpret and comment on** Site-related documents developed under this Consent Order and through U.S. EPA's issuance of the Record of Decision (ROD). If U.S. EPA disapproves of or requires revisions to the Technical Assistance Plan, in whole or in part, Respondents shall amend and submit to U.S. EPA a revised TAP that incorporates all of U.S. EPA's required revisions, within 14 days of receiving U.S. EPA's comments. **The TAP shall state that Respondents will provide and***

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<sup>1</sup> Defined as "1) a group of people who may be affected by a release of threatened release at the Site; 2) incorporated as a nonprofit organization for the purposes of the Site or otherwise established as a charitable organization that operates within the geographical range of the Site and is already incorporated as a nonprofit organization; and 3) able to demonstrate its capability to adequately and responsibly manage any funds awarded." AOC II, § VII(28).

<sup>2</sup> AOC II §§ IV(10), VII(18)

*administer any additional amounts needed, as more fully set forth in the SOW, if the selected community group demonstrates such a need prior to U.S. EPA's issuance of the ROD.*<sup>3</sup>

The SOW supplements the foregoing provision and requires any TAP approved by EPA to contain provisions consistent with the criteria of 40 CFR §§ 35.4065, 35.4070, 35.4075, 35.4190, and 35.4195 as follows:

*Respondents shall prepare a Technical Assistance Plan (TAP) that will provide and administer \$50,000 for a qualified community group to hire Technical Advisors, independent from the Respondents, to help interpret and comment on Site-related documents developed under this SOW and through USEPA's issuance of the Record of Decision.*<sup>4</sup>

*The lists of eligible and ineligible activities shall be consistent with 40 CFR § 35.4070 and §35.4075, respectively.*<sup>5</sup>

*As long as the group documents its selection and the advisor selected by the group satisfies the requirements specified in 40 CFR § 35.4190 and §35.4195, Respondents shall accept the group's choice.*<sup>6</sup>

*If the Community Group demonstrates, consistent with the criteria specified in 40 CFR § 35.4065, that it needs additional funds for TAP activity, then Respondents will provide the additional monies needed.*<sup>7</sup>

### **III. Alleged Violations**

On April 5, 2005, EPA approved a TAP for PINES which was prepared by Respondents ("PINES TAP")<sup>8</sup>. The PINES TAP violates the foregoing CERCLA requirements, and others, in the following respects:

#### **a. PINES TAP limits the purpose for hiring technical advisors**

The AOC II and SOW expressly state that the purpose of TAP funding is to allow a qualified community group to hire independent technical advisors to help the group "interpret and comment on Site-related documents developed under [the AOC II/SOW] through USEPA's issuance of the Record of Decision"<sup>9</sup>. These requirements further the regulatory purpose of TAP funding which is to allow public participation in the decision making process through EPA's issuance of the ROD.<sup>10</sup>

<sup>3</sup> AOC II at 11 (emphasis added).

<sup>4</sup> SOW at 17.

<sup>5</sup> SOW at 18.

<sup>6</sup> SOW at 18.

<sup>7</sup> SOW at 18.

<sup>8</sup> Technical Assistance Plan, Pines Area of Investigation, AOC II Docket No. V-W-04-C-784 (Apr. 5, 2005).

<sup>9</sup> AOC II at 11; SOW at 17 (emphasis added).

<sup>10</sup> 40 CFR 35.4070.

Despite this clearly stated purpose, Respondents, with EPA approval, drafted the PINES TAP to state:

*The purpose of . . . hiring a technical advisor(s) is to assist the P.I.N.E.S. to better understand the investigation process implemented in the RI/FS. The technical advisor's main responsibility is to educate the P.I.N.E.S. about the RI/FS procedures, processes, and results. Therefore, the technical advisor should devote most of his or her time to reviewing site related documents and explaining those documents to the P.I.N.E.S.<sup>11</sup>*

PINES' understanding of decisions made by Respondents and EPA during the RI/FS process, is clearly not the same as PINES participating in those decisions throughout the RI/FS process and EPA's issuance of the ROD. Thus, the limited PINES TAP purpose violates 40 CFR 35.4070, the AOC II and SOW and demonstrates Respondents attempt to restrict criticism and comment of the RI/FS and ROD by the impacted community.

**b. PINES TAP limits the scope of available technical assistance**

The AOC II and SOW require the PINES TAP to include a list of "eligible and ineligible activities" consistent with 40 CFR § 35.4070 and 40 CFR § 35.4075.<sup>12</sup> Nevertheless, PINES TAP § II.I(5) explicitly prohibits the PINES from using TAP funds for "attorney fees of any kind." This directly contradicts 40 CFR § 35.4075(b) which precludes TAP funding for attorney services only if those services are "connected to any kind of legal action or that could, if such a relationship were allowable, be interpreted as resulting in an attorney/client relationship to which the attorney/client privilege would apply." Moreover, under the SOW, as long as the technical advisor selected by PINES "satisfies the requirements specified in 40 CFR § 35.4190 and §35.4195, Respondents shall accept [PINES] choice."<sup>13</sup>

Therefore, the PINES should be able to use PINES TAP funds to hire an attorney as a technical advisor for understanding and navigating the complicated legal standards applicable to the RI/FS process through EPA's issuance of the ROD. Yet, Respondents drafted the PINES TAP with EPA approval to foreclose this opportunity to the PINES in violation of the AOC II, the SOW.

**c. PINES TAP limits PINES' ability to obtain additional funding**

The AOC II mandates that the PINES TAP "shall state that Respondents will provide and administer any additional amounts needed, as more fully set forth in the SOW, if the selected community group demonstrates such a need prior to U.S. EPA's issuance of the ROD."<sup>14</sup> In turn, the SOW states:

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<sup>11</sup> PINES TAP § II.W (Additional provisions in the PINES TAP, including §§ II.B, II.D and II.H, similarly limit PINES' technical advisors' purpose to merely helping PINES to interpret, but not comment on, site-related information and decisions).

<sup>12</sup> SOW at 18.

<sup>13</sup> SOW at 18.

<sup>14</sup> AOCII §VII, Task 10: Community Relations and Technical Assistance Plan (emphasis added).

*If the Community Group demonstrates, consistent with the criteria specified in 40 CFR §35.4065, that it needs additional funds for TAP activity, then Respondents will provide the additional monies needed.<sup>15</sup>*

Clearly, under the AOC II and SOW, Respondents lack discretion to deny PINES' request for additional funding, provided PINES' need for additional funding meets the criteria of 40 CFR §35.4065. Nevertheless, PINES TAP §II.L, drafted by Respondents and approved by EPA, did not include all criteria set forth in 40 CFR §35.4065 thereby violating the AOC II and the SOW. Although PINES TAP §II.L was later amended to comport with the criteria of 40 CFR §35.4065, Respondents, with EPA approval, continue to deny additional funding to PINES based on the unamended, illegal version.

**d. PINES request for additional funding was wrongly denied**

Relying on flawed PINES TAP §II.L, Respondents refused PINES' request for additional funding<sup>16</sup>, even though PINES demonstrated such a need in accordance with the criteria specified in 40 CFR §35.4065. Indeed, EPA admits that:

*[T]he original TAP Agreement's criteria for additional funding was incomplete, causing your client's initial request for funding beyond the original grant of \$50,000 to be denied.<sup>17</sup>*

Despite this admission of violation, EPA asserts that "at a time when [PINES] knew that no funds were available or authorized under the TAP Agreement or otherwise, [PINES] appears to have authorized it's consultant to continue to perform work and incur approximately \$82,000 in additional costs.<sup>18</sup>" This position is manifestly wrong for several reasons:

- 1) the AOC II and SOW were in effect, providing "authorization" for additional funds, regardless of the PINES TAP provision drafted in violation of CERCLA;
- 2) the AOC II and SOW required Respondents to make additional funds "available" because PINES had demonstrated a need for the funds according to the criteria set forth in 40 CFR §35.4065;
- 3) EPA led PINES to believe that additional funding would be forthcoming, and encouraged PINES to continue participating knowing that PINES technical advisors were not being paid.<sup>19</sup>

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<sup>15</sup> SOW at 18 (emphasis added).

<sup>16</sup> Although PINES understands that Respondents have refused payment, Respondents never formally notified PINES of their decision to dispute the request as required by PINES TAP § II.P.

<sup>17</sup> US EPA, Letter of Larry Johnson, Assistant Regional Counsel to Kim Ferraro (Aug. 10, 2010).

<sup>18</sup> *Id* (emphasis added).

<sup>19</sup> See Email of Tim Drexler, Remedial Project Manager to PINES member, Larry Silvestri (June 2, 2009). Moreover, involved PINES members will testify that on numerous occasions Mr. Drexler told them that EPA was working on getting PINES additional funding to cover PINES ongoing costs.

Accordingly, PINES is entitled to additional funding to pay for all eligible activities of its technical advisors including those incurred from July 2008 to the present time.<sup>20</sup> Failure of Respondents to provide such funding constitutes a continuing violation of the AOC II and SOW.

**e. A new budget and work plan is not required for PINES to use additional funding**

Further limiting PINES access to additional funding, EPA contends that "the TAP agreement was amended to include the proper criteria for additional funding" but "in order to make the additional authorized funding available to [PINES], the TAP Agreement requires that a budget and work plan be submitted for review and approval." Again, EPA's position is incorrect and in violation of the AOC II and SOW.

PINES TAP §II.E required PINES to submit a budget and work plan within 30 days of executing the PINES TAP. The PINES TAP is defined as "the legal document" which specifies "the project period" and "a description of the work to be accomplished."<sup>21</sup> PINES TAP § II.N states that "Respondents will fund the PINES for Eligible TAP Project Activities, Section II.H, . . . if the group incurred the costs during the approved 'project period.'" The "project period" is defined as the period extending "from the date of the signing of the TAP Agreement through U.S. EPA's issuance of the ROD."<sup>22</sup> The "project period" does not end simply because the initial \$50,000 in funds were exhausted.

PINES TAP §II.L was amended because it did not comply with 40 CFR §35.4065 ("Amended §II.L"). Amended §II.L did not alter any other provisions of the PINES TAP, including PINES TAP §§II.E, II.H, and II.N.<sup>23</sup> Amended §II.L did not place any new requirements for PINES to submit a new budget or work plan. Indeed, after PINES signed Amended §II.L, EPA invited PINES to:

please resume sending the bills or invoices PINES receives for costs incurred by technical advisors to help interpret Pines Site Remedial Investigation/Feasibility Study documents through issuance of the Record of Decision. Other eligible expenses are outlined in the TAP agreement.

EPA and Respondents cannot now make up a requirement for a new budget and work plan simply to limit PINES access to available funds. PINES is entitled to use those funds for continued "eligible activities" through EPA's issuance of the ROD as allowed under the AOC II and SOW.

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<sup>20</sup> See Ltr. of Mark Hutson to Bud Prast with attached Invoice of Geo-Hydro, Inc. in the amount of \$86,409.90 (Jun. 16, 2009). To date, Geo-Hydro has incurred costs for "eligible activities" that have not been paid in the amount of \$106,216.15.

<sup>21</sup> PINES TAP § I.V.

<sup>22</sup> PINES TAP § II.A.

<sup>23</sup> See Amended §II.L stating that the PINES TAP "is hereby amended pursuant to Section II.HH of the TAP Agreement in the following manner only."

**f. PINES TAP lacks a mechanism for PINES to challenge EPA resolution of disagreement between PINES and Respondents**

Also undermining a level playing field for PINES, the PINES TAP §II.DD does not provide any mechanism for the PINES to seek review if PINES disagrees with EPA's resolution of a dispute between PINES and Respondents. Specifically, PINES TAP §II.DD directs PINES and Respondents to submit their disputes to EPA for resolution. "If Respondents disagree with EPA's resolution of the disagreement, then Respondents may pursue relief pursuant to the Dispute Resolution (Section XIV.) provision set forth in AOC II."<sup>24</sup> However, no such relief is afforded to the PINES in violation of the AOC II and SOW.<sup>25</sup>

**IV. Penalties**

Pursuant to CERCLA § 109, 42 U.S.C. § 9609, and the Adjustment of Civil Monetary Penalties for Inflation, 40 CFR § 19.4, each separate violation of CERCLA subjects the Respondents and EPA to penalties of up to \$32,500 per day per violation for all violations that occurred prior to January 12, 2009, and \$37,500 per day per violation for all violations that have occurred after January 12, 2009, payable to the United States Treasury, plus costs, attorney and expert witness fees. In addition, PINES is entitled to injunctive relief requiring the Respondents and EPA to comply with all CERCLA requirements, and such other relief as may be appropriate.

**V. Summary of Notice of Intent to Sue**

LEAF believes that this Notice of Intent to Sue sufficiently states grounds for filing suit under CERCLA on behalf of PINES. At the close of the 60-day notice period, LEAF intends to file a citizen suit under 42 U.S.C. § 9659 against EPA and Respondents. We intend to seek penalties and injunctive relief for all past, continuing and future violations as well as attorney's fees and costs.

During the 60 day notice period, PINES is willing to discuss effective remedies for the violations noted in this letter including exploring a settlement through mediation. If you wish to pursue such discussions and/or mediation, please initiate those discussions within (10) days of receiving this notice so that a meeting can be arranged and negotiations/mediation completed before the end of the notice period. At the close of the notice period, unless significant progress is made in remedying these violations, we intend to file the above-referenced citizen suit.

Respectfully submitted,

/s/

Kim E. Ferraro,  
Attorney for PINES  
219/464-0104

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<sup>24</sup> PINES TAP § II.DD

<sup>25</sup> SOW at 18.

cc: **Via Certified Mail, Return Receipt Requested**

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**Via Regular Mail**

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